THE DOCTRINE OF CONSIDERATION.

IN spite of all that has been written and said in explanation of the doctrine of consideration, the law is still far from clear upon the subject. The courts are not consistent in their application of the rule, partly because they are unwilling to enforce it strictly in all cases, and partly because they are often hazy in their understanding and knowledge of the topic. All this leads to present uncertainty and doubt. It is further true that consciously or not the law of consideration is being modified gradually, until the present technical requirement is likely to be entirely abolished.

Thus it is said in one case[1] where lack of consideration was urged as a defense:

"Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.'"

This view would abolish the law of consideration and introduce the rule enforced under modern Roman-law systems. If this change is desirable it should be brought about by the legislature. Such a decision is simply an unwarrantable usurpation of legislative powers by the court. The usurpation may be conscious, or it may arise from an attempt to apply the law without a clear comprehension of its principles.

It will not be out of place to examine a few of the doubtful propositions. For example, must consideration be presently exchanged for an offered promise or may it be given subsequently?

Recently a thoughtful writer has given the following definition:[2]

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[1] Ricketts *v.* Scothorn, 57 Neb. 51 (1898).

[2] Dean Henry Winthrop Ballantine, Contracts, 7 Commercial Laws of the World, 81.

"Consideration is primarily the test of bargain, and may be defined as the thing which the promisee gives or promises to give in exchange for the thing promised; not for the promise, as it is usually expressed."

To the objection that under this description only unilateral contracts are possible the writer replies:[3]

"That is true if I grant the 16th century premise 'that in all agreements there must be *quid pro quo* presently.' . . . I do not admit, however, that the contract cannot arise until the consideration is actually furnished."

And he also adds that he would amend the language in my text[4] on Contract to read,

"Consideration is something furnished *or to be furnished* to the promisor at his request and in exchange for *what he promises*."

It seems to me that this is not the generally accepted conception of consideration. As the view comes from an authoritative source it is deserving of careful examination. We are not here concerned with the origin of the doctrine. The question of importance to-day is as to what is now consideration and when it must be furnished. According to the idea given above, consideration is not an element of contract, because it is said that it is incorrect in bilateral contracts to speak of the exchange promise as the consideration, but rather is it the thing promised, *i. e.*, the performance of the promise rather than the promise itself. It is well settled that the contract must arise, when bilateral, at the time the counter promise is given. If this counter promise is not the consideration, but its performance is, then the contract arises before the consideration is furnished, and we have the possibility of a contract without consideration. In other words, neither party can withdraw; and this is so whether the demanded consideration, *i. e.*, the promised performance, is ever furnished or not. According to this view the counter promise amounts to no more than an acceptance, and there would seem to be no real difference in result between an offer calling for a unilateral or bilateral contract. In either event the contract seems to come into existence upon acceptance, and not to be delayed until performance. But

[3] In private correspondence.

[4] Ashley, Law of Contracts, p. 65.

if it be said that in a bilateral contract the counter promise is an obligation, but not consideration, then what is the consideration for this counter promise, and to what does it obligate? If it is the performance of the first promise, then each arises and becomes binding without any consideration, and there is merely the contemplation of performance as the basis of the agreement. Just what part the requested consideration may then play seems uncertain. Apparently the only method by which its enforcement could be secured would be by making it a condition precedent to the performance of the obligation contained in the promise for which it is required. Dean Ballantine further says: [5]

"If we rationalize the doctrine of consideration, we shall find that the apparently arbitrary and technical rules of consideration furnish a touchstone or test of two substantive qualities in the transaction, viz.: (1) Is the engagement of the parties put on the basis of bargain, or is the real basis gratuitous? (2) If a bargain is found, does the subject matter given in exchange have sufficient possibility of value to be the foundation of a legitimate claim, or is it obviously insufficient?"

Here is suggested the idea that consideration is merely for the purpose of showing that a bargain is contemplated. This leads to the natural conclusion that inquiry may be made as to the reasonableness of the proposed exchange. An idea of this sort was suggested in some of the cases dealing with the doctrine growing out of the decision in Pinnel's case.[6] It has been generally recognized that the question of reasonableness was not involved in that decision. While one dollar would not sustain a present proposed exchange for $1000, a beaver hat would.[7] In Schnell *v.* Nell [8] the court had the same thing in mind when it said:

"In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken."

Consideration is not for the purpose of showing an intended business arrangement. In fact the transaction is sometimes meant

[5] Contracts, 7 Commercial Laws of the World, 81.
[6] 5 Co. Rep. 117 (1602).
[7] Foakes *v.* Beer, 9 App. Cas. 605 (1884).
[8] 17 Ind. 29.

to be gratuitous, and the requested consideration desired purely to meet the technicality.

The elements of simple contract are mutual assent and consideration. If either is lacking, there is no contract, whatever other obligation may arise. There are exceptions to this general rule, such, for instance, as compromise cases, but the rule itself has been universally recognized.

It might be well if what Dean Ballantine has described were the law, and if it were merely necessary that a contract should contemplate a business relationship. This would be a question of fact, of which consideration would furnish some proof. It is submitted that such is not our law. It is believed that a contract does not arise until consideration is furnished, and without this essential there is no legal obligation. If an act is requested, there is no promise until the act is performed. But when we say that a bilateral contract is contemplated we indicate by such language that a counter promise, *i. e.*, an obligation, is required by the parties as consideration. Such is the intention of the offer in the supposed case. But if the two promises when exchanged are binding, as they assuredly are, there must be a contract then and there. Suppose now the first promise is to pay money on a date and the second is to do an act at a subsequent time. If when the money is due it is properly tendered and refused and the tender is kept good, there would seem to be no doubt that the other party is bound to perform when the subsequent date arrives and will break his contract if he refuses. Yet as the money has not been paid there has been no performance of the first promise, and hence according to the proposed hypothesis the second promise is without consideration. Or suppose it is a case where the performance consists of the payment of money on one side, and the delivery of a deed or other chattel on the other, both to be performed at the same time. In that event there are mutual and concurrent conditions, and a tender by either party puts the other in default. But a tender is not performance, and if performance is consideration, then the second party is bound to perform without consideration.

In bilateral contracts the counter promise and not its performance would seem to be the consideration demanded, and hence it must be presently exchanged and the consideration cannot be future.

Sometimes there seems to be doubt in regard to "past consideration." It is well settled that consideration cannot be "past," because in that case the so-called "past consideration" has already been furnished, and is not given in exchange for the intended promise.

But in a unilateral contract the act must have been performed before the promise can arise, and hence at first blush it would appear to be "past." The difference is that when an act is done pursuant to an offer it is performed in exchange for the proposed promise, while in instances of "past consideration" this is not so. In the latter case the thing desired has been given prior to the offer, and hence the offerer is no longer able to comply. He cannot give that which is no longer his.

Again, questions have always been raised concerning the nature of bilateral contracts. They were once described as follows: [9]

"When the consideration on each side is a promise the contract is bilateral; a binding promise, the consideration of which is anything else than a promise, is a unilateral contract."

The question is, then, what is the consideration in bilateral contracts? Is it the counter promise or performance of such promise? As described above by Mr. Wald, it is generally believed to be the mutual promises each for the other. But it is suggested that there is a difficulty here. That the two promises must support each other, and neither can be a promise until the other becomes one. The first step is merely an offer, and must ripen into a promise to serve as consideration for the counter promise. But such counter promise must itself serve as a consideration for the original promise which springs from the other. Sir Frederick Pollock suggests [10] that many objections might have been urged in the first instance, and substantially relies upon the settled law as obviating any difficulties which he intimates would lie were the proposition one of first impression.[11] I must confess that the suggested difficulties have never impressed me. We start out with the technical re-

[9] Wald's Pollock, 2 Am. ed., p. 12, note *m*.

[10] Pollock, Contract, 8 ed., p. 191.

[11] Whether, in any given case, there is a promise in law must be determined by the nature of the contemplated performance. For a discussion of this question see 8 HARV. L. REV. 30, 14 *id.* 496, 16 *id.* 319.

quirement of consideration, something which must be given in exchange for a promise in order that it shall exist in law. Suppose the consideration asked in the offer is an act. Then there can be no promise until the act is completed, even though there may be mutual assent. But suppose the act is a bond under seal. Then when the bond is delivered the offer ripens at once into a promise, but not an instant earlier. At that precise point the requested consideration is furnished. In that case, however, the bond is complete by itself, and comes into existence without consideration. Let us see whether this makes any difference. When a promise is demanded, we have in reality an act requested. This act consists in giving something to which the law will annex the obligation of promise. Unlike the bond, the promise, to exist, must have its consideration, which is to be the counter promise. The instant one utters words of such a character as to constitute a promise if the element of consideration is found, the person so speaking has done his part towards giving the act asked, and it simply remains for the law to annex its obligatory character to it. At that point both parties put themselves where the law can act upon them. There appears to be no logical difficulty in saying that the law operates simultaneously upon each and thereby transforms each action into a promise, each mutually dependent upon the other. In all cases there must be some instant at which the law takes effect. This is so in the case of any obligation. A bond becomes such at the instant of delivery. Prior to that it is a mere paper writing. So each promise becomes an obligation when the action of each party makes it possible for the law to act upon each.

There may be very marked differences in result, if consideration is looked upon as an incident in the contract after it has arisen, rather than as an essential to its existence. Once concede that the contract becomes an obligation without consideration, then there would seem to be no good reason why consideration may not be waived by the promisor, but as its presence is essential to the origin of the contract it is not within the power of the parties to do without it. The law refuses to annex the obligation of contract to acts of the parties which lack this essential element. For this reason estoppel is inapplicable. This is not because there may not be a contract, some elements of which are done away

with by acts which result in estoppel or something analogous thereto. For example, mutual assent is generally an essential element, in fact is the characteristic of contract, and yet contracts frequently arise in which there is no actual assent.

This is not true of consideration. The law as it has developed makes this particular requirement a necessity, which the parties cannot avoid. A gratuitous promise is not a contract. No one can waive the requirement of consideration because the law which affixes the obligation refuses to do so under such circumstances. Very true, this is peculiarly technical, and is by no means essential in its nature. But the rule is there, and no doctrine is more consistently enunciated than the one which says that consideration is requisite for a contract.

With such importance attached to a technical requirement of the law, it is not unreasonable for the lay public to ask for a scientifically accurate definition of the term "consideration." It is believed, however, that no satisfactory definition can be given. Deplorable as this may be, it seems nevertheless true. It is due to a lack of accurate legal terminology, which causes confusion when any form of words is used which attempts to explain. A definition to be of value should indicate within its own confines just what it describes. Otherwise it is certainly inaccurate, and may lead to erroneous conclusions. A distinguished authority on the law of contract [12] suggests this definition: "Any surrender of a legal right may be a consideration for a promise." This statement will strike anyone thoroughly familiar with the subject as accurate. But such person does not need any definition, and is not helped thereby. To anyone seeking knowledge, the above suggestion leaves him where he started. He may well inquire what is a "legal right." Can we define such right in a way that will prove a divining-rod, and certainly indicate in advance whether in any given case there exists such a legal right to be surrendered? In other words, this proposed definition simply substitutes one question for another and answers neither. Any attempt to define a legal idea is indeed a "perylous chose."

We still maintain as requisite a technicality existing simply

[12] Prof. T. D. Terry, 12 Col. L. Rev. 574.

because of its historical development, and involving such an important topic as contract. We envelop an obligation of everyday use with a legal rule, which is unnecessary, and which frequently works rank injustice. In view of this and other outgrown doctrines, it is not strange that the common-sense intelligence of the people leads them to regard law and lawyers with suspicion.

A technical rule, however harsh, is less objectionable if clearly understood and consistently applied. Men may shape their conduct to meet the requirement. But the doctrine of consideration is not so enforced. Neither courts nor thinking writers are willing to follow fearlessly wherever the rule may lead. Thus there seems to be no escape from possible injustice in certain cases where a unilateral contract is contemplated. Such an eminent authority as Sir Frederick Pollock refuses to follow the premises to their legitimate conclusion.[13] It is inconceivable that the author does not understand the argument. Yet he attacks it by assuming other questions as involved, sets up an imaginary position as to acceptance, and then proceeds to knock down this rag baby of his own creation. If any one disapproves the result, why not recognize the force of the logic, and refuse to accept the rule on the simple ground that it works injustice?

After all these years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration. There is not even a full agreement as to what it is. I believe that an able judge might, by an authoritative statement, overrule the entire doctrine, and declare that the common-law rule of consideration is not now enforced. This would require courage as well as an accurate knowledge of the subject. Such a bold course would be far preferable to any attempt to reach the same result by subterfuge, with talk about estoppel and the like. This indirect method only leads to confusion, doing more harm in the long run than it accomplishes possible good in the given case.

But if the courts will not bring about this result, the time has come when the legislature should act. This could be accomplished by a brief statute stating in accurate terms that the doctrine of consideration is abolished.

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[13] Pollock, Contract, 8 ed., p. 26, note (*c*); 28 Law Quarterly Review, p. 100.